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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 ROBERT NEFF,

10 Plaintiff,

11 v.

12 ZEWDNEH N. DESTA, et al.,

13 Defendants.
14

Case No. C18-1716-RSL

ORDER ON MOTIONS *IN*
LIMINE

15 This matter comes before the Court on the parties' "Motions *in Limine*" (Dkts. #63, 65),
16 and plaintiff's "Motion to Allow Testimony by Video Conference at Trial" (Dkt. #70). As
17 discussed at the pretrial conference held on March 2, 2020, the Court issues the following
18 tentative rulings, with the possibility of revisiting rulings if necessary during trial.

19 **A. PLAINTIFF'S MOTIONS *IN LIMINE* (Dkt. #63)**

20 **1. Evidence Regarding Plaintiff's Alleged Failure to Mitigate Damages**

21 At present, the parties agree that there is no claim that plaintiff failed to mitigate damages
22 in this case, though defendants raise the possibility this could change depending on plaintiff's
23 presentation of his case. Plaintiff's first motion *in limine* is tentatively GRANTED.

24 **2. Testimony of Clifford McQuarrie**

25 Plaintiff raises several issues with the witness testimony of Clifford McQuarrie, seeking
26 to preclude him from offering hearsay, speculative testimony, and improper credibility
27 commentary. Defendants indicate that they will not offer improper or inadmissible testimony at
28 trial. McQuarrie will be permitted to testify under oath. Plaintiff will have the opportunity to

1 cross-examine McQuarrie and may raise objections if issues arise during trial. Plaintiff's second
2 motion *in limine* is DENIED.

3 **3. Evidence Attributing Fault to Safeway or Securitas**

4 The Court denied defendants' motion for leave to amend their answer on February 7,
5 2020. See Dkt. #72. Defendants have indicated that they will comply with the Court's ruling
6 and accordingly do not oppose plaintiff's motion. Plaintiff's third motion *in limine* is
7 GRANTED.

8 **B. DEFENDANTS' MOTIONS *IN LIMINE* (Dkt. #65)**

9 **1. Evidence of Plaintiff's Past Medical Expenses**

10 Defendants seek to exclude evidence of plaintiff's past medical expenses on grounds that
11 plaintiff failed to disclose any witnesses in his initial disclosures who will opine as to the
12 reasonableness of those expenses. See Patterson v. Horton, 84 Wn. App. 531, 543 (1997)
13 ("[M]edical records and bills are relevant to prove past medical expenses only if supported by
14 additional evidence that the treatment and the bills were both necessary and reasonable.").
15 Plaintiff must comply with the initial disclosure requirements set forth in Federal Rule of Civil
16 Procedure ("FRCP") 26(a)(2)(C). As discussed at oral argument, despite plaintiff's failure to
17 comply with the Rule regarding the anticipated testimony about plaintiff's medical bills, the
18 Court will allow plaintiff to supplement his compliance by making the required FRCP
19 26(a)(2)(C) disclosures within thirty (30) days of the date of this Order. Trial has been
20 continued in this case, and the Court finds defendants will not be prejudiced by a supplemental
21 disclosure. Assuming plaintiff supplements his disclosures within thirty days of this Order,
22 defendants' first motion *in limine* is DENIED

23 **2. Expert Opinions from Plaintiff's Medical Providers**

24 Defendants also seek to exclude opinions of plaintiff's medical providers, citing
25 plaintiff's failure to comply with the non-retained expert disclosure requirements set forth in
26 FRCP 26(a)(2)(C). As discussed at oral argument, despite plaintiff's failure to comply with the
27 Rule, the Court will allow plaintiff to supplement his compliance by making the required FRCP
28 26(a)(2)(C) disclosures within thirty (30) days of the date of this Order. Trial has been

1 continued in this case, and the Court finds defendants will not be prejudiced by a supplemental
2 disclosure. Assuming plaintiff supplements his disclosures within thirty days of this Order,
3 defendants' second motion *in limine* is DENIED

4 **3. Graphic Photos of Plaintiff's Injuries**

5 Photographic evidence is not inadmissible merely because it is gruesome or unpleasant.
6 See, e.g., Rivers v. United States, 270 F.2d 435, 436-39 (9th Cir. 1959); see also Washburn v.
7 Beatt Equip. Co., 120 Wn.2d 788, 801 (1992). Photographs of plaintiff's injuries are relevant to
8 illustrate, *inter alia*, the nature of his injuries, the process of treatment, and damages. Federal
9 Rule of Evidence ("FRE") 403 is in place to prevent unfair prejudice at trial. Accordingly,
10 defendants' third motion *in limine* is DENIED. However, as discussed at oral argument, all
11 graphic photos shall be brought to the Court's attention before use during trial, and plaintiff shall
12 not use the photographs during opening or closing arguments without prior approval from
13 defendants.

14 **4. Securitas Incident Report**

15 The incident report prepared by Securitas, the security company at the Safeway
16 Distribution Center, lacks foundation and is inadmissible in its entirety. Defendants' fourth
17 motion *in limine* is GRANTED.

18 **5. Evidence or Argument Regarding Statutory "Rules of the Road"**

19 Defendants raise the possibility that plaintiff will introduce certain statutory evidence
20 under RCW 46.41, deemed "Rules of the Road." By their terms, the statutory rules of the road
21 are inapplicable in private lots. See RCW 46.61.005, 46.04.197. Express evidence of
22 Washington's statutory rules of the road is unnecessary and defendants' fifth motion *in limine* is
23 GRANTED.

24 **6. 2015 K&B Safety Training PowerPoint**

25 As discussed during oral argument, the Court reserves ruling on defendants' sixth motion
26 *in limine* until trial.

7. Evidence or Argument Regarding Defendant Desta's Post-Accident Conduct

Defendants' seventh motion *in limine* is GRANTED in part and DENIED in part. The parties may question defendant Desta as to certain conflicts in the evidence, including regarding K&B's post-accident policies and when and why he moved his truck after the accident. However, plaintiff has not articulated a plausible legal basis for spoliation of evidence and will not be permitted to introduce evidence or argument suggesting that Desta tampered with evidence or engaged in spoliation.

8. Evidence or Argument Regarding Accident Preventability Issues

To the extent evidence of accident preventability becomes relevant to expert testimony regarding industry standards, defendants' eighth motion *in limine* is DENIED. However, to the extent defendants' eighth motion seeks to exclude evidence of subsequent remedial measures, see Fed. R. Evid. 407, their motion is GRANTED.

9. Defendant Desta's Personnel File

Plaintiff does not intend to admit most of the documentation in defendant Desta's personnel file, and each party describes certain potentially relevant documentation in the file. Defendants' ninth motion *in limine* is premature and overbroad. It is accordingly DENIED.

10. Expert Opinions that Allegedly Usurp Province of Jury

The parties agree that experts may offer testimony regarding industry standards and how they believe the parties' conduct fell below the standard of care. The parties shall not elicit expert testimony constituting legal conclusions, including as to the apportionment of fault between the parties. Defendants' tenth motion *in limine* is GRANTED.

11. Evidence Regarding Size of Defendant K&B's Business Operation

Evidence regarding the size and extent of defendant K&B's business operation has little to no probative value and may unfairly prejudice defendants. Defendants' eleventh motion *in limine* is GRANTED.

12. Untimely Disclosed and Produced Medical Illustrations

Defendants seek to exclude certain medical illustrations, which plaintiff intends to use as demonstrative aids during trial. While the illustrations were not timely disclosed, plaintiff

1 produced them on January 29, 2020. See Dkt. #75 (Ex. K). Trial has been continued in this
 2 case, and the Court finds plaintiff's untimely disclosure has not prejudiced defendants.
 3 Defendants' twelfth motion *in limine* is DENIED.

4 **13. Arguments Regarding "Sending a Message"**

5 Defendants seek to exclude any arguments to the jury "that its verdict can send a larger
 6 message about issues either directly or indirectly related to this case." Dkt. #65 at 17. Plaintiff
 7 does not intend to suggest that the jury should award punitive damages, but because he seeks
 8 full compensatory damages, he wishes to inform the jury of policies underlying Washington tort
 9 law, including deterring future harm and fully compensating plaintiff for any damages suffered.
 10 Dkt. #74 at 15-16 (citing, *e.g.*, Johnson v. Spider Staging Corp., 87 Wn.2d 577, 583-84 (1976);
 11 Barr v. Interbay Citizens Bank, 96 Wn.2d 692, 699 (1981)). Defendants' thirteenth motion *in*
 12 *limine* is GRANTED in part and DENIED in part. Plaintiff shall not introduce arguments
 13 regarding "sending a message," but may introduce arguments regarding deterrence and
 14 compensation to the extent they reflect the policies underlying Washington state tort law.

15 **C. PLAINTIFF'S MOTION TO ALLOW TESTIMONY BY VIDEO** 16 **CONFERENCE AT TRIAL (Dkt. #70)**

17 Plaintiff filed a motion to allow testimony by video conference at trial for certain out-of-
 18 state lay witnesses and health care professionals. See Dkt. #70. He states that the "locations
 19 and/or schedules" of these witnesses "may prevent them from testifying in person at trial." Id. at
 20 2. Defendants oppose the motion. See Dkt. #78. Pursuant to FRCP 43(a),

21 At trial, the witnesses' testimony must be taken in open court unless
 22 a federal statute, the Federal Rules of Evidence, these rules, or other
 23 rules adopted by the Supreme Court provide otherwise. For good
 24 cause in compelling circumstances and with appropriate safeguards,
 25 the court may permit testimony in open court by contemporaneous
 26 transmission from a different location.

27 Fed. R. Civ. P. 43(a). The Notes of Advisory Committee on FRCP 43 emphasize,

28 The importance of presenting live testimony in court cannot be
 forgotten. The very ceremony of trial and the presence of the
 factfinder may exert a powerful force for truth-telling. The

1 opportunity to judge the demeanor of a witness face-to-face is
2 accorded great value in our tradition.

3 Id. Plaintiff's proffered rationale for requesting testimony by video conference is to reduce
4 expense and travel time and to avoid scheduling issues for his witnesses. These concerns do not
5 constitute "good cause in compelling circumstances" to justify contemporaneous transmission of
6 testimony by video conference. Plaintiff's motion (Dkt. #70) is DENIED without prejudice to
7 his ability to renew his motion if good cause arises once trial is scheduled.¹

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9 DATED this 29th day of April, 2020.

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13 Robert S. Lasnik
14 United States District Judge
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27 ¹ As a result of the ongoing COVID-19 outbreak, it is increasingly unlikely that civil jury trials
28 will occur in this District prior to 2021. The Court recognizes that good cause for allowing video
testimony may exist if COVID-19 emergency measures remain in place when trial is scheduled. See
generally W.D. Wash. Gen. Order Nos. 07-20, 02-20.